

cally beyond the pale of judicial scrutiny. Impotence in such cases is the sole and settled ground of nullity. Continuing, the judge says that it seems to him that the question is vitally distinct where the barrenness is absolute; is not a constitutional quality or a functional failure, but a physical incapacity, resulting from congenital malformation or the total loss of the organs of conception by disease or the surgeon's knife. So he holds, December, 1897, that a person destitute of child-bearing organs is physically incapable of the chief and higher purpose of matrimony, and consequently of entering the marriage state. And it follows, he holds, that in concealing from the husband the fact and extent of her misfortune, the defendant in this case procured his consent to marry her by fraud, which constituted a good ground for divorce. But had the plaintiff married her with knowledge that the surgical operation performed on her involved the removal of her ovaries he would, of course, be estopped from action because of her physical condition. The fact that in this case the prospective husband had asked whether she was physically and mentally capable of being a wife, and that the judge says that good faith required that she should have then disclosed the fact that the surgical operation involved the removal of the ovaries, perhaps casts some doubt on whether the judge would have decided as to the fraud and divorce therefor as he did, though his reasoning set forth would seem to have required it, had not the inquiry been made of her.

Prior Removal of Ovaries Ground for Annuling Marriage.—The exceedingly novel and important question was raised in the case of *Wendel vs. Wendel*, whether the husband is entitled to the annulment of a marriage contracted without knowledge on his part that his wife was physically incapable of conception as the result of a surgical operation, such as the removal of her ovaries, known to her, but concealed from him. Section 1743 of the New York code of civil procedure provides that an action may be maintained to procure a judgment declaring a marriage contract void, and annulling the marriage, among other causes existing at the time of marriage, where one of the parties was physically incapable of entering into the marriage state. In deciding the question presented, under this provision, Mr. Justice Hirschberg of the special term of the supreme court of New York, Kings County, follows, in part, this line of reasoning: Was the defendant wife, at the time of the marriage, physically incapable of entering into the marriage state, within the meaning of this statute? The answer depends in great measure upon what are recognized by law as the objects and purposes of marriage. If sexual intercourse alone is so recognized, then it must be conceded that the defendant in this case was physically capable. But the creation of a family is also regarded as one of the chief purposes of a matrimonial union, and it is difficult to see how an individual can be physically capable of performing the contract who has lost the organs essential to conception. The question is different from that presented by sterility or barrenness. It is well settled that a marriage will not be annulled for the mere barrenness of the wife. Not only is such a condition and its continuance difficult, if not impossible, to prove, but its existence, if established, may not be innate, but only peculiar to an inharmonious combination. In such cases, whether the power to conceive or to impregnate be at issue, the question of the condition and its permanence rests on hypothesis and speculation, and is practi-